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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, ET AL., PETITIONERS

v.

JOSEPH P. MOODY, ET AL.

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, PETITIONER

v.

JOSEPH P. MOODY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether a district court, in determining whether to award back pay to members of an identifiable class of persons who have suffered economic injury because of racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, must exercise its discretion in a manner consistent with the remedial purposes of the Act.

2. Whether petitioner Albemarle's employment selection tests are unlawful because they have a disproportionate adverse impact on blacks and have not been shown to be substantially job-related.

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Pursuant to Title VII of the Civil Rights Act of 1964 and Executive Order 11246, the Equal Employment Opportunity Commission, the Attorney General, and other branches of the federal government have responsibility for enforcement of federal laws providing for equal employment opportunities. Although this case was brought by private plaintiffs, the issues concerning back pay and testing raised here are similar to issues that arise in suits brought by the government. The resolution of the issues presented in this case will directly affect the government's enforcement responsibilities.

STATEMENT

1. On August 25, 1966, respondents, after they had received a right-to-sue letter from the Equal

Employment Opportunity Commission, filed a class action [1] against their employer, Albemarle Paper Company (petitioner in No. 74-389), and their union, Halifax Local No. 425 (petitioner in No. 74-428),[2] alleging that the defendants were engaged in racially discriminatory employment practices in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.* The complaint sought a permanent injunction against those practices and prayed for "such other additional relief as may appear to the Court to be equitable and just" (A. 10).

The alleged discriminatory employment practices took place at Albemarle's paper mill in Roanoke Rapids, North Carolina. The principal business of the paper mill is the production of kraft paper, pulp,

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[1] The district court defined the classes represented by respondents as "(1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially discriminatory employment practices of the defendants" (A. 474).

[2] The original three defendants were Albemarle Paper Company (Virginia), the United Papermakers and Paperworkers, and Papermakers Halifax Local 425. The international union was subsequently dismissed as a defendant (A. 16-20). In 1968, the company's assets were sold and transferred in a series of transactions. As a result, Albemarle Paper Company (Delaware), Hoerner Waldorf Corporation, Ethyl Corporation, and First Alpaco Corporation were joined as defendants (A. 30-39).

and allied products (A. 88). The mill has 11 functionally discrete departments (A. 477, 514), and each department has one or more functionally related lines of progression consisting of several job categories (A. 88, 477). The mill has 17 lines of progression and more than 100 job classifications (A. 477, 514). In all but exceptional circumstances, employees enter a line of progression at the lowest paying job, and vacancies are filled by promotions from within each line of progression on the basis of seniority and ability (A. 477).

In addition to the lines of progression, the mill, prior to 1968, had two "extra boards"—reservoirs of employees who were available to staff the lowest-level jobs in the lines of progression. The General Extra Board supplemented the skilled lines of progression; the Utility Extra Board supplemented the unskilled lines of progression (A. 485). The extra boards were staffed by new employees and employees who had been laid off from other jobs and were awaiting recall (*ibid.*). In 1968, the two extra boards were merged (A. 486).

Promotions and demotions in the plant are governed by job seniority. When a vacancy occurs, the first opportunity to fill it is ordinarily given to the employee in the next lowest job category within the line of progression who has the greatest seniority in that job, if he possesses the necessary ability, experience, and training (A. 477-478).

Albemarle uses personnel tests in selecting applicants for employment in certain jobs. Since 1963,

applicants for 13 lines of progression in eight departments [3] have generally been required to have a high school education and to score successfully on the Revised Beta Examination—a nonverbal test developed during World War I to measure the intelligence of illiterate and non-English-speaking persons —and the Wonderlic A or B Series examinations—short, verbal tests used to measure general mental ability (A. 100-101, 487-488, 514).

2. After a trial, the district court found that "[p]rior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race" (A. 480). Approximately 86 of the 100 jobs at the plant were "traditionally reserved for white persons" (A. 477). The court found that "[t]hose lines of progression to which black employees were traditionally assigned were lower paying than the 'white' lines of progression" and that "[t]he racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965)" (A. 480). The extra boards were also segregated on the basis of race. As of June 1967, there were 62 white and two

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[3] These figures were derived by the district court and the court of appeals from a stipulation filed on July 25, 1971 (A. 86-106). Altough the court of appeals stated that examinations are required for employment in 14 lines of progression (A. 514), both the stipulation and the district court's opinion indicate that 13 is the correct number. Albemarle states (Br. 13) that, as a result of changes in mill operations, the tests were administered, by the time of trial, to applicants for only eight lines of progression in four departments.

black employees assigned to the General Extra Board; no whites and 50 blacks were assigned to the Utility Extra Board (A. 484-485).

Although a 1968 collective bargaining agreement effected some "changes in the lines of progression [that] had the effect of eliminating, to some extent, their strictly segregated composition," "black employees were still 'locked' in the lower paying job classifications" (A. 485). Similarly, while the two extra boards were merged in 1968, "[e]mployees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board," so that "black employees are recalled to black jobs and white employees are recalled to white jobs" (A. 486).

The court concluded that "Albemarle practiced racially discriminatory employment practice[s] prior to July 2, 1965," and that "the effects of this discrimination has [*sic*] been perpetuated" (A. 495-496). The court stated (A. 496):

> Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher paying lines of progression.

The court ordered the defendants "to abolish the existing seniority system based substantially on job seniority" and "to implement and permanently continue a system of plant seniority * * * so that * * * when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are relatively equal, plant seniority rather than job seniority shall govern" (A. 499-500).

The district court declined to award back pay to members of the class who had suffered economic injury as a result of the discriminatory employment practices that locked them into the lower paying jobs to which they had been assigned on the basis of race. The court rested its denial of back pay on two considerations. First, "there was no evidence of bad faith non-compliance with the Act" (A. 498).[4] Second, the plaintiffs did not specifically seek back pay in their complaint[5] and did not assert a back pay claim until "nearly five years after the institution of this action" (*ibid.*). "[T]he defendants

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[4] The court stated that Albemarle had begun in 1964 to recruit blacks for its Maintenance Apprentice Program, that it merged some lines of progression on its own initiative and took certain steps to correct abuses in accordance with developing judicial interpretations of the Act, and that it paid higher wages for all levels of employment than did other industries in the area (A. 498).

[5] In their memorandum in opposition to a motion for summary judgment, plaintiffs stated that "[n]o money damages are sought for any member of the class not before the court" (A. 13-14).

would be substantially prejudiced by the granting of such affirmative relief," the court stated, because they "might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue" (*ibid.*).

The court also rejected respondents' contention that Albemarle's testing requirements are unlawful because they have a disproportionate adverse impact on blacks and were not shown to be related to job performance. It concluded that "[t]he personnel tests administered at the plant have undergone validation studies and have been proven to be job related" (A. 497).

The validation study conducted by Albemarle covered 10 job groups in 8 of the 13 lines of progression for which the tests are required (A. 514). Albemarle's expert conducted no job analysis of the jobs covered by the study.* The sample of employees tested for the study were selected from the top and middle ranges of the lines of progression (A. 490). Their scores on each of the three tests use by Albemarle—Beta, Wonderlic A, and Wonderlic B—were compared with job performance ratings assigned to them by two supervisors, who rated them according to this standard: "Excluding a man's attitude, just how well the guy can do the job when he's feeling right" (A. 195, 514-515). The study found "[s]ig-

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* The expert spent only about a half day at the plant (A. 174). He had no written job descriptions (*ibid.*) and did not speak with any supervisors while he was at the mill (A. 175).

nificant correlations * * * for at least one of the three tests investigated for nine of the ten groups of jobs" (A. 431). The use of all three tests was found valid only for one of the 10 job groups, and the use of the Beta together with either Wonderlic A or Wonderlic B—the use made of the tests by Albemarle[7]—was found valid only for two of the 10 job groups (A. 432).

On the basis of that validation study, the district court found that "[t]he defendants have carried the burden of proof" in demonstrating the job-relatedness of the company's testing program (A. 497). The court found, however, that "the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications" (A. 497). It accordingly enjoined Albemarle from "requiring a high school education as a prerequisite for employment, promotion or transfer" (A. 502).

3. The court of appeals reversed with respect to the back pay and testing issues (A. 512-537).[8]

On the back pay issue, the court held that neither plaintiffs' delay in making a claim for back pay nor the lack of evidence of bad faith noncompliance with

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[7] All applicants are given the Beta examination and both series of the Wonderlic test. They are required to score satisfactorily both on the Beta and on either the Wonderlic A or the Wonderlic B (A. 220).

[8] Petitioners did not appeal any aspect of the district court's order.

the Act "is sufficient to justify the district court's refusal to award back pay" (A. 520). Relying on its rejection of similiar contentions in *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, the court of appeals reasoned that Albemarle was not substantially prejudiced by the plaintiffs' delay in seeking back pay and that a showing of bad faith is not required for an award of back pay, because the award is designed not to penalize the employer but to compensate the victims of the discrimination for their tangible economic loss.

The court rejected the contention that the denial of back pay should nevertheless be sustained as within the discretion of the district court. "Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed" (A. 523). The court stated that, in view of "the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII"—which favors making the victims of the unlawful discrimination economically whole so far as possible—"a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (A. 523-524). It held that "there are no such special circumstances here" (A. 524).

With respect to testing, the court stated: "The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to

require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error" (A. 515). The court concluded that the tests were not shown to have "a manifest relationship" to the jobs for which they are used by Albemarle (A. 516). Since "[t]he plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact" (A. 515), and since Albemarle failed to show that the tests are substantially job related, it followed under *Griggs* v. *Duke Power Co.*, 401 U.S. 424, that the testing procedure is unlawful.*

SUMMARY OF ARGUMENT

I

A. When a district court finds that an employer or a labor union has intentionally engaged in unlawful employment practices, it may enjoin those practices and may "order such affirmative action as may be appropriate, which may include * * * reinstatement or hiring of employees, with or without back pay" (42 U.S.C. (Supp. III) 2000e-5(g)). The court's discretion with respect to back pay awards must, however, be exercised in accordance with "the

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* Judge Boreman dissented on the testing issue (A. 524-532), and Judge Bryan dissented on the back pay issue (A. 532-537).

large objectives of the Act" (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 331), for it is the duty of a court of equity "to provide complete relief in light of the statutory purposes" (*Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292).

The objectives of Title VII are to eliminate discriminatory employment practices and, so far as possible, to compensate the victims of employment discrimination for their economic loss caused by the discrimination. The district court's duty "to fashion the most complete relief possible" (see 118 Cong. Rec. 7168, 7565) upon a finding of employment discrimination ordinarily means that it must both enjoin the unlawful practices and award back pay to the injured victims. "Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194). Moreover, the reasonably certain prospect that back pay will be awarded provides an important economic incentive for employers and unions to comply voluntarily with the provisions of Title VII and thereby to bring a prompt end to employment discrimination.

It follows that the Act's policies of making the victims whole and deterring future discrimination require back pay to be awarded to the injured employees unless, for substantial reasons that are consistent with the Act's purposes, awarding back pay would be unjust to the employer or the union. That is the standard that the court of appeals applied here

and that this Court applied with respect to awards of counsel fees under Title II of the Act in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402.

B. The district court's reasons for denying back pay in this case do not satisfy that standard. Since the remedial purpose of Title VII is to compensate the injured victims of employment discrimination and not to punish the employer, the absence of "bad faith non-compliance" (A. 498) does not justify denying back pay. A requirement that injured employees prove malice or deliberate recalcitrance would be an unwarranted obstacle to effective relief and would weaken the incentive for voluntary compliance by making back pay awards depend upon the application of an uncertain, subjective standard. This Court rejected a similar standard for the award of counsel fees in *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, and it should reject it here as well.

Nor was the plaintiffs' delay in asserting a back pay claim on behalf of the entire class of injured employees a proper basis for denying back pay. The defendants were aware of that claim at least one year prior to trial, and their defenses to the claim were identical to their defenses with respect to injunctive relief. There is no foundation for the district court's speculation that the defendants "might have chosen to exercise unusual zeal" (A. 498) in expediting a trial if they had known of the back pay claim earlier, nor is there any support for petitioners' assertion that discovery was made more difficult by plaintiffs' delay. In the absence of a showing of sub-

stantial prejudice, that delay did not affect the district court's duty to award complete relief.

C. Back pay relief is not limited to those members of the class who have filed individual charges with EEOC. The filing of a single charge alleging unlawful employment practices fully satisfies the purposes of Title VII's filing requirement by putting the employer on notice of the charge and invoking EEOC's conciliation functions. There is no reason to require the filing of numerous identical claims. Congress considered and rejected precisely such a requirement when it enacted the 1972 amendments to Title VII.

II

A. That Albemarle's tests operate disproportionately to exclude blacks was implicit in the district court's lengthy discussion concerning the job-relatedness of the tests and was the subject of an explicit finding by the court of appeals (A. 515). Albemarle argues that the plaintiffs failed to make an adequate showing that the tests have a racially disparate impact, but that issue was not presented in the petition for a writ of certiorari and is not properly before this Court. In any event, the record supports the court of appeals' finding.

B. The court of appeals correctly concluded that Albemarle did not carry its burden of showing that its present use of the tests "have a manifest relationship to the employment in question" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432). In making

that determination, the court of appeals properly looked to the EEOC *Guidelines* as "a helpful summary of professional testing standards" (*Vulcan Society* v. *Civil Service Commission*, 490 F. 2d 387, 394, n. 8 (C.A. 2)) and made proper use of the *Guidelines* in assessing the adequacy of Albemarle's test validation study.

In a Title VII case within the scope of EEOC's enforcement jurisdiction, it is particularly appropriate for a court to rely upon the professional expertise reflected in the *Guidelines*. And where, as here, the pertinent sections of the *Guidelines* accurately summarize the professionally accepted standards for test validation and no showing is made that there are significant differences of opinion within the profession, an employer whose validation study departs from the *Guidelines* should bear the heavy burden of showing that the departure was justified and that the study was nevertheless adequate to prove that the tests are job-related.

Albemarle's study was not conducted in accordance with the *Guidelines*, and the company neither justified the departure nor demonstrated that the study was otherwise adequate. Albemarle's expert failed to conduct a job analysis to determine the skills and abilities required for successful performance of the jobs he studied; under generally recognized professional standards, a job analysis is an essential first step in a proper employment test validation study. Its absence in Albemarle's study made it nec-

essary to rely on a vague, subjective standard for supervisory ratings of employees and made it impossible to tell whether the abilities rated by the supervisors and measured by the tests are the ones that are necessary to perform the jobs at the mill.

The study also departed from professional standards because Albemarle's expert did not take precautions to ensure that the tests were administered under controlled and standardized conditions and that the raters were kept unaware of the employees' test scores. Moreover, the jobs studied were at the higher levels in the plant, although applicants for employment naturally begin work at the lower levels. Albemarle did not show that it was reasonable to validate the tests for the jobs studied rather than those that a new employee would perform.

Even if the study had been conducted properly, however, its results do not show that the tests are related to the jobs for which they are used. The study covered only eight of the 13 lines of progression for which tests are required, and it found correlations supporting Albemarle's present use of the tests for only two of the 10 job groups studied. Albemarle's claim that it is necessary to ensure that all applicants are qualified for each line of progression in the plant is not supported by the record.

ARGUMENT

I

THE COURT OF APPEALS CORRECTLY HELD THAT BACK PAY SHOULD BE AWARDED TO THE IDENTIFIABLE VICTIMS OF UNLAWFUL EMPLOYMENT DISCRIMINATION HERE TO COMPENSATE THEM FOR THEIR ECONOMIC INJURY CAUSED BY THE DISCRIMINATION

The district court found that petitioners engaged in unlawful discriminatory employment practices that confined the black employees at Albemarle's paper mill to the lower paying, less desirable jobs to which they had been assigned on the basis of their race (A. 480-486, 496). The court was therefore authorized under Section 706(g) of the Act, 42 U.S.C. (Supp. III) 2000e-5(g), to enjoin the unlawful practices and to "order such affirmative action as may be appropriate, which may include * * * reinstatement or hiring of employees, with or without back pay * * *." Although the victims of petitioners' racially discriminatory practices suffered tangible economic loss as a result of the discrimination, the district court refused to award them compensatory back pay because it found "no evidence of bad faith non-compliance with the Act" and because respondents' initial failure specifically to request back pay on behalf of the class they represent may have induced petitioners not to exercise "unusual zeal in having this court determine their rights at an earlier date" (A. 498).

The court of appeals held that the district court's denial of back pay for those reasons was not a proper

exercise of its discretion under the Act. That discretion, the court stated, must be exercised "with an eye to the purposes of the Act" (A. 523) and in a way that gives the fullest possible effect, consistent with fairness, to the congressional policy of making whole the victims of employment discrimination.

Petitioners contend (Albemarle Br. 50-61; Halifax Br. 21-33) that the court of appeals unduly restricted the scope of the district court's statutory discretion in determining whether to award back pay and that the district court's refusal to award back pay in this case should have been sustained under "traditional equitable principles" (Albemarle Br. 53). Albemarle also argues (Br. 61-66) that back pay may not, in any event, be awarded to individual members of the affected class of injured employees who have not themselves filed charges with the Equal Employment Opportunity Commission. In our view, petitioners are wrong on both counts.

A. The Congressional Policy Reflected In Title VII Requires That Victims Of Employment Discrimination Be Awarded Back Pay In Compensation For Their Economic Loss Unless Special Circumstances Would Make Such An Award Unjust To The Employer

The issue here is not whether the district courts have discretion to award or withhold back pay, for the Act clearly commits that decision to the sound discretion of the trial judge. Nor is the issue whether that discretion "is governed by traditional equitable principles" (Albemarle Br. 53); Congress in-

tended in Section 706(g) to invest the courts with full, traditional equity jurisdiction to fashion effective relief upon a finding of unlawful employment practices. Cf. *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398, 400; *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292.

The issue, rather, is the extent to which the district courts' exercise of discretion under the Act is circumscribed by, and must be responsive to, the legislative objectives of Title VII. It is settled, of course, that traditional equity jurisdiction does not empower a court to take whatever action it wishes. Discretion must be exercised according to appropriate standards. In the enforcement of a statutory scheme, the courts must exercise their discretion "in light of the large objectives of the Act"; their discretionary remedial determinations must "reflect an acute awareness" of the congressional policy (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 331). It is "the historic power of equity to provide complete relief in light of the statutory purposes" (*Mitchell* v. *Robert DeMario Jewelry, Inc.*, *supra*, 361 U.S. at 292).

Albemarle thus properly concedes that a district court's discretion under Section 706(g) of the Civil Rights Act of 1964 "must be exercised consistently with legislative objectives" (Br. 53). It seeks to avoid the thrust of that principle, however, by arguing that the legislative objective was "to leave resolution of complex remedial problems to the traditional, discretionary powers of the federal courts of equity" (Br. 54).

But that argument begs the question. It merely restates a proposition that no one disputes—that the district courts have discretion in determining whether to award back pay. As Chief Justice Marshall stated long ago, to say that the matter is within a court's discretion means that it is addressed not to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles" (*United States* v. *Burr*, 25 Fed. Cas. 30, 35). The proper inquiry is this: what are "the large objectives of the Act" (*Hecht Co.* v. *Bowles*, *supra*, 321 U.S. at 331) in accordance with which that discretion must be exercised?

The large objectives of Title VII are to eliminate discriminatory employment practices and, as far as possible, to restore the victims of employment discrimination to the situation they would have been in but for the discrimination. "The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it" (*Bowe* v. *Colgate-Palmolive Co.*, 416 F. 2d 711, 720 (C.A. 7)).

Albemarle's contention that "the Congressional emphasis was on the prospective elimination of discriminatory practices and not on reparations" (Br. 54) rests on its inference from the word "may" in the statutory phrase "may include * * * reinstatement or hiring of employees, with or without back pay" (Section 706(g)). But that inference is unjustified. The same word is used in connection with injunctive

relief: "the court *may* enjoin the respondent from engaging in such unlawful practice" (emphasis added). Every court of appeals that has considered the question has correctly concluded that the Act's purposes are both to eliminate employment discrimination and to compensate the victims.[10]

The "make whole" purpose of Title VII is confirmed by the legislative history of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, which reenacted Section 706(g) with changes not relevant here. The Section-by-Section Analysis of the 1972 Act, presented to the House and the Senate at the time the Conference Report on the Act was submitted to each body (118 Cong. Rec. 7166-7169, 7563-7567), states with respect to Section 706(g) (*id.* at 7168, 7565; emphasis added):

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful dis-

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[10] See, *e.g.*, *Rosen* v. *Public Service Electric and Gas Co.*, 477 F. 2d 90, 96 (C.A. 3); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791, 804 (C.A. 4); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F. 2d 211, 252 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364, 1375 (C.A. 5); *United States* v. *Georgia Power Co.*, 474 F. 2d 906, 921 (C.A. 5); *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870, 876 (C.A. 6); *Bowe* v. *Colgate-Palmolive Co.*, *supra*, 416 F. 2d at 720; *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1202 (C.A. 7), certiorari denied, 404 U.S. 991.

> crimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also *requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*

Injunctive relief serves the purpose of eliminating the discriminatory practices prospectively. An award of back pay serves the purpose of making the victims financially whole. In view of the Act's objectives, the district court's duty "to fashion the most complete relief possible" (*ibid.*) ordinarily means that it must both enjoin the unlawful practices and award back pay to those who have suffered financial injury as a consequence of the discrimination. As this Court said with respect to back pay awards under Section 10(c) of the National Labor Relations Act, which was the model for Section 706(g) of the Civil Rights Act of 1964, "compensation for the loss of wages" is "generally require[d]" to effectuate the policies of that Act, because "[o]nly thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 194). See also *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263.

Moreover, compelling practical considerations support the view that back pay should normally be

awarded to redress proven injuries. The reasonably certain prospect that back pay will be awarded provides the only substantial economic incentive to encourage voluntary compliance with Title VII and therefore a swift end to unlawful employment discrimination. Back pay awards "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history" (*United States* v. *N.L. Industries, Inc.*, 479 F. 2d 354, 379 (C.A. 8)).

An employer or union is less likely to make a serious attempt to eliminate discriminatory practices or practices that perpetuate the effects of past discrimination if it can reasonably anticipate a court order after lengthy litigation that merely requires it to do what it should have done in the first place. Indeed, with respect to changes in practices that would require the expenditure of money, the absence of back pay as a usual element of relief under Section 706 (g) could provide a financial incentive to an employer or union to maintain the unlawful *status quo* as long as possible.

It follows that, in the exercise of their discretion to effectuate the Act's purposes and to encourage prompt, voluntary compliance with its terms, the district courts should ordinarily award back pay to the identifiable victims of unlawful employment discrimination, unless there are substantial countervailing considerations that make such an award unnecessary

or inappropriate. In the court of appeals' words, the injured victims of the discrimination "should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (A. 523-524).

That standard neither forecloses nor unduly restricts a district court's exercise of discretion. Courts of equity always have "the duty * * * to be alert to provide such remedies as are necessary to make effective the congressional purpose" (*J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433). And in the enforcement of the civil rights statutes, "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (*Louisiana* v. *United States*, 380 U.S. 145, 154).

The standard adopted by the court of appeals here is identical to the one that this Court applied to the exercise of a district court's discretion to award attorney's fees under Title II of the Act. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400. The court of appeals there had ruled that counsel fees should be awarded only to the extent that a party advances defenses in bad faith and for purposes of delay. This Court held that that standard would not adequately effectuate the purposes of the counsel-fee provision of Title II. That provision was enacted "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by

racial discrimination to seek judicial relief under Title II" (390 U.S. at 402). Since private litigation is an essential "means of securing broad compliance with [Title II]" (*id.* at 401), and since a plaintiff suing as a "private attorney general" cannot recover damages, awards of counsel fees are important to "vindicat[e] a policy that Congress considered of the highest priority" (*id.* at 402).

The situation here is analogous. While this case involves Title VII rather than Title II and back pay awards rather than attorney's fees, the effect of awarding back pay in the absence of special circumstances similarly vindicates the broad congressional policy reflected in the Act and similarly ensures compliance with the law. The "special circumstances" standard is no less an appropriate guide for the exercise of discretion in awarding back pay under Title VII than it is for the exercise of discretion in awarding counsel fees under Title II.

We do not suggest, nor did the court of appeals hold, that back pay is mechanically compelled where violations of the Act are found. Nor do we suggest that courts of appeals should lightly overturn the informed exercise of a district court's discretion. Where unlawful employment practices result in economic loss to identifiable persons, however, the "make whole" purpose of Title VII, and the important policy of encouraging voluntary compliance with the law, should normally call for compensation, in the absence of substantial countervailing considerations. The district court must articulate its reasons for denying

back pay, and those reasons should be carefully scrutinized by the appellate courts to ensure that the district court has fashioned the fullest possible relief consistent with fairness.

As we understand the application of the "special circumstances" standard to the question of back pay, the Act's policies of making the victims whole and deterring future discrimination require back pay to be awarded unless, for substantial reasons that are consistent with the purposes of the Act, awarding back pay would be unjust to the employer. One such special circumstance, in the context of employment practices that discriminate on the basis of sex, might be the employer's reasonable and good-faith reliance upon state female "protective" statutes. See *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 460 F. 2d 1228 (C.A. 5), certiorari denied, 409 U.S. 990; *Manning* v. *International Union*, 466 F. 2d 812 (C.A. 6), certiorari denied *sub nom. Manning* v. *General Motors Corp.*, 410 U.S. 946; *Kober* v. *Westinghouse Electric Corp.*, 480 F. 2d 240 (C.A. 3); but see *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F. 2d 1002 (C.A. 9).[11] As we shall now show, no such special circumstance justified the district court's denial of back pay in the present case.

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[11] Under EEOC interpretive guidelines in effect from 1965 through August 1969, such state protective laws were considered consistent with Title VII. Compare 30 Fed. Reg. 14927 with 34 Fed. Reg. 13368. Reliance on a published EEOC guideline is a defense to liability under Title VII (42 U.S.C. 2000e-12(b)).

B. Neither The Absence Of Bad Faith Non-Compliance Nor The Tardiness Of Plaintiffs' Back Pay Claim Justifies Denying An Award Of Back Pay To The Injured Victims Of The Discriminatory Employment Practices In This Case

Since the purpose of a back pay award is to compensate the injured persons and not to punish the employer, the absence of bad faith should not ordinarily justify denying back pay. As between the innocent victim of an unlawful employment practice and the employer or union that has violated the law, the economic loss should normally fall on the wrongdoer. Cf. *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co., supra,* 396 U.S. at 264-265. Accordingly, the courts of appeals have uniformly rejected general claims of good faith as a reason to deny back pay under Title VII.[12]

To make back pay awards dependent upon proof of malice or deliberate recalcitrance would place an unwarranted obstacle in the path of those seeking compensation for economic injury resulting from un-

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[12] See, e.g., *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 253; *Head* v. *Timken Roller Bearing Co., supra,* 486 F. 2d at 877; *Sprogis* v. *United Airlines, Inc., supra,* 444 F. 2d at 1201; *Waters* v. *Wisconsin Steel Works,* 502 F. 2d 1309, 1321 (C.A. 7); *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F. 2d 437, 442-443 (C.A. 5); *Robinson* v. *Lorillard Corp., supra,* 444 F. 2d at 804; *Rosen* v. *Public Service Electric and Gas Co., supra,* 477 F. 2d at 95-96; *Carey* v. *Greyhound Bus Co.,* 500 F. 2d 1372, 1378-1379 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F. 2d at 1365-1367. Compare *United States* v. *St. Louis-San Francisco Ry. Co.,* 464 F. 2d 301, 311 (C.A. 8), with the same court's subsequent decision in *United States* v. *N.L. Industries, Inc., supra,* 479 F. 2d at 378-379.

lawful employment discrimination. As in *Newman* v. *Piggie Park Enterprises, Inc., supra*, where the Court rejected a similar "bad faith" test for the award of attorney's fees, requiring a showing of bad motive would not adequately effectuate the purpose of the Act.

The subjective good faith of an employer or a labor union does not diminish the economic harm suffered by the victims of discrimination and should not exempt the violator from the obligation to make those victims whole. Moreover, good faith is an inherently vague standard, the application of which would reduce the predictability of back pay awards and thus weaken the incentive for voluntary compliance with Title VII.

This Court stated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, that "good intent or absence of discriminatory intent does not redeem" an otherwise unlawful employment practice. For similar reasons, good intent should not, at least in the absence of extraordinary circumstances not present here, immunize an employer or a labor union from the obligation to compensate the innocent victims of employment discrimination.

Nor should the plaintiffs' initial disclaimer of an intention to seek back pay on behalf of members of the class not before the court justify denying an award in this case. Since petitioners knew of the back pay claim for all members of the class at least as early as June 4, 1970 (A. 28-29), they were on full notice of the claim more than a year prior to trial. The district court itself stated in an opinion filed 10

months prior to trial that "[t]he possibility of an award of money damages upon a determination of liability is still with us" despite the plaintiffs' earlier disclaimer (A. 38). The court reiterated several weeks before trial that the claim for back pay would be considered on its merits and that "damages may be recovered in this action if the plaintiffs prevail" (A. 51). This advance notice gave petitioners ample opportunity to address the matter completely in the district court.

Moreover, as the court of appeals correctly held, the defenses available to petitioners with respect to the back pay issue were identical to their defenses with respect to injunctive relief. Petitioners were thus no less able to defend against the back pay claim than they would have been had it been asserted at the time the complaint was filed. The district court's speculation that petitioners "might have chosen to exercise unusual zeal" in expediting the trial if they had known that back pay was in issue (A. 498) is contradicted by the absence of any indication that they exercised any such "unusual zeal" after learning that the plaintiffs were seeking back pay. Albemarle makes no representation in its brief that it would have sought an earlier trial.

Albemarle contends that "[d]iscovery relating to individual claims was clearly rendered much more difficult, if not impossible, by the passage of time" (Br. 58). But the record reflects that the district court ordered the plaintiffs to answer Albemarle's interrogatories concerning individual back pay claims

and to submit "a statement as to each such member of the class as to how he was personally and specifically discriminated against; and the amount of damages being claimed" (A. 46). Albemarle does not indicate why those discovery procedures were inadequate.[13]

In the absence of substantial prejudice to petitioners, the delay in claiming back pay should not alter the district court's duty "to fashion the most complete relief possible" (Section-by-Section Analysis of 1972 Act, *supra*, 118 Cong. Rec. 7168, 7565). Rule 54(c) of the Federal Rules of Civil Procedure provides that the district court "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Accordingly, other courts of appeals have correctly held that Title VII back pay claims asserted even after trial are entitled to full adjudication in the absence of prejudice. See *Rosen* v. *Public Service Electric and Gas Co.*, 409 F. 2d 775, 780, n. 20 (C.A. 3); *Robinson* v. *Lorillard Corp.*, *supra*, 444 F. 2d 802-803; *United States* v. *Hayes International Corp.*, 456 F. 2d 112, 121 (C.A. 5).

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[13] Nor should back pay be foreclosed because Albemarle's assets were sold by Ethyl Corporation to Hoerner Waldorf Corporation in 1968. If Hoerner Waldorf truly acted "in the belief that in this suit plaintiffs were not seeking damages" (Albemarle Br. 58), that consideration goes only to the allocation of liability as among the various defendants.

C. Back Pay Claims Should Be Determined For All Class Members Who Have Sustained Economic Loss, Whether Or Not They Filed Individual Charges With The Equal Employment Opportunity Commission

Albemarle concedes (Br. 62) that membership in a Title VII class action for injunctive relief need not be limited to persons who have filed charges with the Equal Employment Opportunity Commission. *Miller* v. *International Paper Co.*, 408 F. 2d 283, 284-285 (C.A. 5); *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496, 499 (C.A. 5). It contends, however, that back pay should be denied to those members of the class who did not individually file charges with EEOC.

The purpose of the provision of Title VII (Section 706, 42 U.S.C. 2000e-5) requiring the filing of charges with EEOC is to provide notice to the charged party of the alleged violation of the Act and to bring to bear the voluntary conciliatory functions of EEOC. The filing of a single charge alleging unlawful employment practices gives the employer notice of the complaint and an opportunity to correct the unlawful practices. It would serve no useful purpose to require scores of substantially identical claims to be processed through EEOC when a single charge is sufficient to satisfy the requirements of Title VII. *Bowe* v. *Colgate-Palmolive Co.*, *supra*, 416 F. 2d at 720; *Miller* v. *International Paper Co.*, *supra*, 408 F. 2d at 285; see also *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398, 421-422 (C.A. 5), certiorari granted on other issues, March 24, 1975, No. 74-728; *Head* v. *Timken Roller Bearing Co.*, *supra*, 486 F. 2d at 876.

Just as with injunctive relief, once it has been determined that the defendant has engaged in unlawful employment practices that have caused the class members financial loss, the defendant's liability for back pay arises from conduct applicable to all affected members of the class. That the particular way in which that common conduct has affected individual class members may differ in degree, so that the amount of back pay owing to each affected class member may vary, does not change the essential class characteristics of the discriminatory practices. "Once class-wide discrimination has been demonstrated to result in disproportional earnings, a class-wide decision that back pay is appropriate can be discerned without deciding which members of the class are entitled to what amounts" (*Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 257). Thereafter, the district court [14] can proceed to determine how much back pay is owed to which class members.[15]

As respondents' brief demonstrates (pp. 37-41), the legislative history of the Equal Employment Op-

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[14] In appropriate cases, the court may refer the matter to a special master. See Fed. R. Civ. P. 53. The district court in the present case stated in a pretrial order that "if [back pay] claims become too numerous or complicated, this phase of the case may be referred to a special master" (A. 51). The record reflects that approximately 80 persons filed claims for back pay in the district court (A. 70-85, 116-117).

[15] For a comprehensive discussion of methods for determining back pay awards, see *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F. 2d at 251-263, and *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F. 2d at 1374-1375, 1379-1380.

portunity Act of 1972 shows that Congress considered and rejected a provision, originally included in the bill that passed the House, that would have foreclosed an award of back pay to any member of a class who had not filed an individual charge with EEOC. The report accompanying the Senate bill, which omitted the provision contained in the House bill, stated that "any restriction on [class] actions would greatly undermine the effectiveness of title VII" (S. Rep. No. 415, 92d Cong., 1st Sess., p. 27). The Section-by-Section Analysis of the bill that emerged from the Conference Committee and that was passed by both houses stated: "[T]he leading cases in this area to date have recognized that many Title VII claims are necessarily class complaints and that, accordingly, it is not necessary that each individual entitled to relief be named in the original charge or in the claim for relief. A provision limiting class actions was contained in the House bill and specifically rejected by the Conference Committee" (118 Cong. Rec. 7168, 7565).

Congress thus explicitly rejected the precise limitation on class action relief that Albemarle now asks this Court to accept.

II

ALBEMARLE'S TESTING PROGRAM IS UNLAWFUL BECAUSE ITS TESTS OPERATE TO EXCLUDE BLACKS AND HAVE NOT BEEN SHOWN TO BEAR A DEMONSTRABLE RELATIONSHIP TO SUCCESSFUL PERFORMANCE OF THE JOBS FOR WHICH THEY ARE USED

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, this Court held that Title VII prohibits the use of tests or other employee selection procedures that operate to exclude members of minority groups, unless the employer demonstrates that the procedures are substantially related to job performance—*i.e.*, that they reliably measure capability for, or accurately predict successful performance of, the jobs for which they are used. The district court in the present case ruled that Albemarle carried its burden of demonstrating that its tests are job-related. The court of appeals, however, relying on the principles established by this Court's decision in *Griggs* and looking to EEOC's *Guidelines on Employee Selection Procedures* (29 C.F.R. Part 1607) for guidance in determining the adequacy of Albemarle's proof, held that the company's test validation study was methodologically deficient and did not, in any event, demonstrate that the tests provide a reasonable measure of the applicant's ability to perform successfully the jobs for which the tests are used. That holding is correct.

A. Albemarle's Tests Have A Disproportionate Adverse Impact On Blacks

Under Title VII, as construed by this Court in *Griggs*, the plaintiffs bear the threshold burden of showing that a challenged testing procedure disqualifies from employment opportunities a disproportionately high percentage of minority group candidates. If that showing is made, the burden shifts to the defendant to demonstrate that the tests are job-related.

Although the district court did not specifically state that Albemarle's tests disproportionately exclude blacks, it did find that the higher paying lines of progression "remain essentially segregated because of the inability of black employees to meet the educational and testing requirements" (A. 496). Moreover, the adverse racial impact of the tests was an implicit premise of the court's lengthy discussion concerning the job-relatedness of those tests, in which it concluded that "[t]he defendants have carried the burden of proof" by demonstrating that the tests are job-related (A. 497). The court of appeals was more explicit. It stated that "[t]he plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact" (A. 515).

Albemarle argues (Br. 28-31) that the plaintiffs' showing was not sufficient and that the company therefore was not required to prove that the tests are job-related. That issue, however, was neither presented in Albemarle's petition for a writ of certiorari nor fairly comprehended within any issue that was presented. It is, therefore, not properly before this

Court. *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16.

In any event, we believe, substantially for the reasons stated by respondents (Br. 19-21), that the court of appeals was justified in concluding that the plaintiffs carried their threshold burden of showing a disproportionate racial impact.

B. The Company's Testing Program Was Not Shown To Be Job-Related

Albemarle attempted to meet its burden of showing that its tests are related to the jobs for which they are used by submitting the results of a test validation study conducted in 1971 by Dr. Joseph Tiffin (A. 431-438). The court of appeals correctly concluded that the study failed to demonstrate that Albemarle's tests "have a manifest relationship to the employment in question" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 432).

In reaching that conclusion, the court of appeals drew upon the testing expertise reflected in several sections of EEOC's *Guidelines on Employee Selection Procedures*, 29 C.F.R. Part 1607. One of those sections emphasizes the importance of a careful job analysis to identify "[t]he work behaviors or other criteria of employee adequacy which the test is intended to predict" (29 C.F.R. 1607.5(b)(3)). Another highlights the danger of relying upon the "subjective evaluations" of supervisors in measuring the job performance of the subjects of a validation study, because of "the possibility of bias inherent in" such

evaluations (29 C.F.R. 1607.5(b)(4)). A third section states that the validity of a test with respect to a particular job may be demonstrated by evidence of validity with respect to a related job, if "no significant differences exist" between the jobs (29 C.F.R. 1607.4(c)(2)).

The court of appeals held that Albemarle's validation procedure was deficient because the expert who conducted the study performed no job analysis but relied exclusively upon the "possibly subjective rating of supervisors who were given a vague standard by which to judge job performance" (A. 517). Referring to the *Guidelines*, the court stated: "We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study" (A. 518).

The court also held that, "[e]ven if the validation procedure had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study" (*ibid.*). The court recognized that "a test need not always be validated for each job for which it is required" (*ibid.*), but it held that the absence of any job analysis for the lines of progression involved in the study and those for which the tests are required "prevents concluding that no significant differences exist in the jobs in question" (A. 519).

Finally, the court held that "it was also error to approve requiring applicants to pass two tests for positions where only one test was validated" (*ibid.*).

Although Albemarle argued that the requirement is appropriate because the company hires employees into a pool from which they may move into any one of several lines of progression, the court stated that "Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative" (A. 519-520).

In our view, each of these holdings is correct. Albemarle's validation study was not conducted in accordance with professionally accepted standards, and it failed, in any event, to show that the tests are substantially related to performance of the jobs for which they are used.

1. ***The court of appeals correctly looked to the EEOC Guidelines for guidance in assessing the adequacy of Albemarle's validation study***

Albemarle's threshold contention is that the court of appeals erroneously "equat[ed] EEOC suggested technical methodology with acceptable standards of judicial proof of job relatedness" (Br. 34). That is not the way we read the court of appeals' opinion.

The court did not state or imply that the *Guidelines* have the force of law or that the adequacy of a validation study depends upon rigid compliance with each provision of the *Guidelines*. It merely looked to the *Guidelines* as a source of professionally accepted standards for the validation of employee selection procedures, giving them the "deference" to which they

are entitled as an "interpretation of the Act * * * by the enforcing agency" (A. 516). See *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 433-434.

The determination whether a testing device has been adequately validated as a reasonable measure of job performance is complex and technical. Since most district judges are not experts in industrial psychology or psychometrics and are not professionally equipped to evaluate the adequacy of a test validation study, it is appropriate for them to defer to the experts in those fields for guidance.

There are several accessible sources of such expertise in the field of employee test validation. The American Psychological Association's *Standards for Educational and Psychological Tests and Manuals* (hereinafter APA *Standards*) are generally regarded as stating in a comprehensive fashion the accepted standards of the psychological profession.[16] The government agencies with responsibilities in the area of equal employment opportunities—including EEOC, the Department of Labor, and the Civil Service Com-

[16] The 1966 edition of the APA *Standards* is part of the record in this case and is set forth at A. 415-426. The *Standards* were revised in 1974, but the revisions do not substantially affect the provisions relating to the matters at issue here. Albemarle's expert, Dr. Tiffin, testified that the *Standards* are "a classic" in the psychological profession, that he generally agrees with the principles for validating tests that are contained in the *Standards*, and that he attempted in his study to follow those principles "[a] hundred percent" (A. 172, 209).

mission—publish guidelines or regulations dealing in a more concise fashion with test validation.[17]

These standards, guidelines, and regulations are not in every respect identical, but each can provide useful guidance to a court in evaluating an employer's test validation study. In a case such as the present one, involving a private employer subject to the provisions of Title VII and within the scope of EEOC's enforcement responsibilities, it is particularly appropriate for the court to look to the EEOC *Guidelines* for "a helpful summary of professional testing standards" (*Vulcan Society* v. *Civil Service Commission*, 490 F. 2d 387, 394, n. 8 (C.A. 2)), since "these guidelines undeniably provide a valid framework for determining whether a validation study manifests that a particular test predicts reasonable job suitability" (*United States* v. *Georgia Power Co.*, 474 F. 2d 906, 913 (C.A. 5)).

If there are substantial, legitimate differences within the profession, the court should of course apply the *Guidelines* with appropriate caution in light of those differences. But where, as here, the *Guidelines* accurately reflect the standards and expertise of the psychological profession and no showing is made that

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[17] The former Labor Department order governing the validation of employment tests by contractors and subcontractors subject to the provisions of Executive Order 11246 appears at A. 321-328. The current version, which is substantially the same as the EEOC *Guidelines*, appears at 41 C.F.R. Part 60-3. The Civil Service Commission's regulations governing test validation appear at 37 Fed. Reg. 21557-21559.

there are significant differences of professional opinion with respect to the relevant portions of the *Guidelines*, an employer whose validation study departs from those provisions should bear the heavy burden of showing that the departure was warranted and that the validation study was nevertheless adequate to demonstrate that the tests are job-related. In these circumstances, the *Guidelines* "should be followed absent a showing that some cogent reason exists for noncompliance" (*United States* v. *Georgia Power Co.*, *supra*, 474 F. 2d at 913).

The court of appeals in the present case did not rigidly and uncritically apply the *Guidelines* to Albemarle's study. It looked to the *Guidelines* for assistance in evaluating that study and found that the pertinent provisions were helpful in identifying the study's inadequacies. Albemarle made no claim that those provisions were the subject of professional disagreement, nor did it show that the study was adequate notwithstanding its apparent defects. In those circumstances, the court's limited reliance upon the *Guidelines* was plainly appropriate.

2. Albemarle's validation study was not conducted in accordance with professionally accepted standards

The tests used by Albemarle—the Revised Beta Examination and the Wonderlic A and B—do not purport to test the specific skills that are required to perform the jobs in question. They measure only general aptitude and intelligence. Consequently, Title

VII's command that "any tests used must measure the person for the job and not the person in the abstract" (*Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 436) highlights the importance of a properly conducted validation study in this case as a means of ensuring that the general aptitude tests used by Albemarle do not reflect the common "inadequacy of broad and general testing devices" (*id.* at 433).[18]

Albemarle's study, however, was not conducted in accordance with professionally accepted validation procedures. A job analysis—the breaking down of a job into its basic elements—is, under generally recognized professional standards, an essential first step in a validation study (A. 205, 369-371). See the EEOC *Guidelines*, 29 C.F.R. 1607.4(c), 1607.5 (b)(3) (A. 310, 312-313); APA *Standards*, ¶ C4 (A. 419); Department of Labor Order, 41 C.F.R. 60-3.6 (a)(3); Civil Service Commission Regulations, ¶ S3-1(a)(3) (37 Fed. Reg. 21557). Albemarle's expert conducted no job analysis.

A job analysis identifies the skills needed to perform the duties and tasks of a particular job. It might reveal, for example, that manual dexterity and concentration are necessary for a particular job but

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[18] The Wonderlic tests used here and in *Griggs* (see 401 U.S. at 430, n. 6) have been the subject of numerous challenges under Title VII. See, *e.g.*, *Rogers* v. *International Paper Co.* 9 [CCH] EPD ¶ 9865 (C.A. 8); *Young* v. *Edgcomb Steel Co.*, 499 F. 2d 97, 98, 100 (C.A. 4); *Franks* v. *Bowman Transportation Co.*, *supra*, 495 F. 2d at 412; *Duhon* v. *Goodyear Tire & Rubber Co.*, 494 F. 2d 817, 818-819 (C.A. 5); *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F. 2d at 1372.

that speed is not. A job analysis therefore provides a basis for an objective rating of an employee's ability to do a job. Since Dr. Tiffin conducted no job analysis, he was obliged to rely on subjective supervisory ratings—"just how well the guy can do the job when he's feeling right"—as the sole measure of job performance.

Not only do such subjective criteria provide "a ready mechanism for discrimination" (*Rowe* v. *General Motors Corp.*, 457 F. 2d 348, 359 (C.A. 5)), but also they leave the raters free to interpret the criterion according to their personal views. Thus, while manual dexterity and concentration may in fact be the skills necessary for the job, the supervisor operating under a subjective standard might be rating the employees on the basis of speed and demeanor. If the tests actually measured the ability to work quickly, but not the relevant criteria of manual dexterity and concentration, there might be a high correlation between test scores and supervisory ratings, but the tests would not in fact measure the ability to perform the job.

Thus, while Albemarle contends that a job analysis is "superfluous" (Br. 37) because its tests correlated in some respects with the supervisory ratings, the absence of a job analysis makes it impossible to determine whether the correlation is meaningful. The abilities rated by the supervisors and measured by Albemarle's tests may not be the ones that are necessary to perform the jobs at the mill.

The absence of a job analysis led to another defect. The study was conducted not for individual jobs but for groups of jobs adjacent to each other on a line of progression (A. 166, 174). For example, Dr. Tiffin's first job group included the jobs of caustic operator and lime kiln operator (A. 432). Since there was no job analysis for either job, however, there was no basis for determining whether the two jobs involve similar tasks requiring similar skills, and therefore no foundation for concluding that they could properly be validated as a group (see A. 205).

This defect was compounded by the rating method. Supervisors were instructed to rate the employees in each job group against one another—that is, to rank them in order (A. 187). Thus, a supervisor was required to determine whether a caustic operator was superior to a lime kiln operator, though there was no analysis indicating that the two jobs were substantially the same.

The study was deficient in other respects as well. The EEOC *Guidelines*, 29 C.F.R. 1607.5(b)(2) (A. 312), like the APA *Standards*, ¶ C4.5 (A. 421), deem it essential that tests be administered under controlled and standardized conditions and that proper safeguards be taken to assure that test scores do not contaminate the job performance ratings—*i.e.*, that raters are not made aware of the test scores of the employees they are rating. Dr. Tiffin, however, did not administer the tests himself and did not know who did administer them (A. 176). He did not take precautions to avoid contamination

and did not know whether the supervisors who rated the employees were or were not aware of the test scores (A. 177). Plaintiffs' expert testified that it was "extraordinarily bad practice" for the person conducting the validation study to leave security measures to those "who have an interest in the outcome" (A. 206).

Moreover, the job groups used in the validation study were selected from the middle and higher categories in the lines of progression studied (A. 167, 178), although successful applicants for employment would be performing entry-level work in the lower job categories for several years. Dr. Tiffin sought to justify the use of the upper-level categories on the ground that "those are the jobs to which these men will go if they stay in the progression line long enough" (A. 167).

But that standard—which would justify the testing of beginning factory workers by examinations that measure the ability to perform the job of senior foreman—does not comport with the standards of the profession. The EEOC *Guidelines*, 29 C.F.R. 1607.4 (c)(1) (A. 310), state that it is appropriate to evaluate employees for higher job levels only if "new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level * * *." The Civil Service Commission's regulations, ¶ S3-5, 37 Fed. Reg. 21558, are to the same effect. While the court of appeals declined to decide whether this defect was significant because it believed that there was "insufficient evi-

dence below as to the time in which it takes an employee to progress to higher level jobs" (A. 519, n. 4), we submit that the burden of presenting that evidence should be borne by the person seeking to prove the job-relatedness of the tests. In the absence of such evidence, it is not possible to determine whether the tests have been properly validated for the jobs for which they are required.

3. *The study does not, in any event, demonstrate that the tests are related to the jobs for which they are used*

Even if Dr. Tiffin had followed professionally accepted procedures in conducting the validation study, the results of the study would not validate the tests for the use to which they are put by Albemarle. The district court found (A. 487), on the basis of a stipulation (A. 100), that the Beta and Wonderlic tests are administered to applicants for 13 lines of progression in eight departments.[19] Dr. Tiffin's study, however, covered only eight lines of progression in five departments (A. 514).

Title VII requires that a testing program with a racially disparate impact be shown to bear a demonstrable relationship to successful performance of each job for which it is used. Although a single validation study covering selected jobs might suffice to prove

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[19] Albemarle now states (Br. 13, 44) that the tests are in fact administered to applicants for eight lines of progression in four departments. If so, that can be shown in the district court on remand. We address our comments to the facts currently of record.

the test's validity as used for additional jobs that are substantially similar (see 29 C.F.R. 1607.4(c)(2) (A. 310-311)), the absence of a job analysis here makes it impossible to determine whether the jobs excluded from the study are similar to those that were covered. The result, as the court of appeals correctly held (A. 518-519), is that the study does not support Albemarle's use of the tests in lines of progression not covered by the study.

Moreover, Albemarle administers all three of its tests to job applicants and requires satisfactory scores on both the Beta and either the Wonderlic A or the Wonderlic B (A. 220; see Albemarle Br. 44, n. 44). But Dr. Tiffin's study found that the Beta together with either Wonderlic A or Wonderlic B correlated with job performance in only two of the 10 job groups studied (A. 432). As the court of appeals correctly held, the study does not justify "requiring applicants to pass two tests for positions where only one test was validated" (A. 519).

Albemarle's answer is that it is reasonable to require all applicants to qualify under both tests because it "cannot predict in which line of progression an employee will be needed" (Br. 46). The practice of hiring all employees into a pool "has the advantage of flexibility in workforce" (Br. 47), and it would be "unreasonable to disrupt the entire hiring system" (Br. 46) in order to ensure that the tests are used exclusively for the specific jobs to which they are related.

But this Court held in *Griggs* that a test which operates to exclude blacks must be "shown to bear a demonstrable relationship to successful performance of the jobs for which it [is] used" (401 U.S. at 431). Qualifying all applicants for every line of progression may give Albemarle greater "flexibility." But "Congress has forbidden * * * giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance" (*id.* at 436). Business "flexibility" is not "business necessity" (*id.* at 431).

Although Albemarle asserts that its testing program is necessary "[t]o preserve the safe and efficient operation of its pulp mill" (Br. 46), the court of appeals correctly found that the record does not support that assertion. "Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative" (A. 519-520).

Finally, Albemarle states that, while "[t]hese objections may be grounds for modifying the District Court's order, * * * they are not grounds for enjoining the use of tests completely, as the Court of Appeals has done" (Br. 44). But that is not what the court of appeals has done. It held only that Albemarle's present use of the tests is unlawful. Albemarle is not precluded from demonstrating on remand that some other use of its tests is justified under the *Griggs* standard.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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